Supreme Court, U.S.
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No. 93-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER ALEXANDER LOCE'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Under the facts of this case, the conviction of the petitioners is an unconstitutional application of the New Jersey criminal trespass statute. The petitioners were removed, arrested and convicted for asserting their constitutional rights and those of Mr. Loce's child. It is unconstitutional for New Jersey to punish the petitioners for exercising their constitutional rights and protecting the rights of the child. The purpose and effect of New Jersey's action was to protect the mother's "interest" in terminating the life of her child which New Jersey thought was protected by the Fourteenth Amendment and to prevent the petitioners from protecting the child's life and right to live and the rights of the petitioner. The questions pertaining to the humanity of the child, the child's rights, those of the father and whether the mother has a protected interest in killing her child under the Fourteenth Amendment are relevant to the convictions of the petitioner.

ARGUMENT

I. NEW JERSEY'S CLAIM THAT IT IS "IRRELEVANT" THAT THE CHILD IN THIS CASE IS A HUMAN BEING EVIDENCES BOTH A MISINTERPRETATION OF *ROE V. WADE*, AND A MISUNDERSTANDING OF THE PRINCIPALS OF LAW GOVERNING THE

UNCONSTITUTIONAL APPLICATION OF OTHERWISE CONSTITUTIONAL CRIMINAL STATUTES.

The State of New Jersey, in response to the petitions filed in this case, has submitted argument in response, overly simplistic by any standard, which is clearly wrong in its basic conclusion: that the fact the child in this case is a human being bears no relevance to the conviction of the petitioners [Res. Br. p.5]. Although the State avoids discussion of the obvious manner of the relevance of the facts, fails to respond to the arguments in both petitions which address their relevance and is devoid of any authority which truly addresses the principles which would control this case, it appears that the State's argument contains two unsubstantiated propositions: [1] the statute under which the petitioners were prosecuted was not an abortion statute and, as a statute which regulates conduct [criminal trespass] clearly within the State's police power, it's enforcement must always be constitutional [presumably, even in its application to petitioners under the facts of this case] [Res. Br. p.5]; and [2] such facts are otherwise irrelevant to "a women[s]...right to an abortion" [Res. Br. p.4].

A. Under The Facts Of This Case Conviction Of The Petitioners Is An Unconstitutional Application Of An Otherwise Valid

Statute And Constitutes A Deprivation Of The Constitutional And Unalienable Rights Of Mr. Loce's Child And Each Of The Petitioners.

The State of New Jersey argues "irrelevancy" as though the petitioners have attempted to mount a "facial challenge" to a criminal trespass statute. In doing so they urge this court to adopt the legal standard which would only apply to such a challenge: that the statute is constitutional unless there "no set of circumstances exists under which the act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

As a consequence the State has completely failed to address the actual contention of the petitioners: that this *specific application* of the statute (perfectly good on its face) is unconstitutional because, under the facts, it constitutes an unconstitutional infringement of the unalienable and natural rights of the child, and the child's father and the Fourteenth Amendment due process and equal protection rights of both.

The critical factors are that: [1] the enforcement of the statute, under all of the circumstances, did not render the deprivation of the asserted rights "incidental," but the very act of the State, of which the petitioners complain, directly, necessarily, totally, and irre-

versibly destroyed the rights in question; [2] the conduct of the petitioners for which they were prosecuted was essential to protect the life of the child and preserve the rights asserted; [3] the day before his arrest the State denied Mr. Loce access to court to assert those rights by summarily dismissing his civil complaint; [4] the courts convicted the petitioners because they found that the State was compelled to protect the mother's interest in taking the child's life -- the very purpose of the state action being the deprivation of the child's rights asserted; and [5] the State refused to allow defenses, ordinarily recognized by New Jersey in the defense of human beings, because the court ruled that *Roe v. Wade* required the state to permit the child's life to be terminated, regardless of the factual conclusion that the child was a human being. Obviously, the Federal Constitutional issues of the child's rights and whether a mother has a protectible interest in killing her own child are directly implicated.[1]

[1] For the purpose of determining whether petitioners' convictions depend upon the constituional and unalienable rights of the child and the father's rights to defend the child [and this Court's need to address these constitutional issues in this case], the petitioners are in exactly the same position as a father (and those who assisted him) had the child been two years old following birth. If one parent planned to kill a two year old child, and New Jersey first dismissed a civil suit asserting the child's rights and then arrested that parent when he or she went to the place where the child's life was to be taken to prevent the child's death, the prosecution and conviction of that parent would hinge entirely upon the constitutional rights of the

Statutes which are constitutional on their face have been found by this court to be unconstitutional in their applications under a variety of circumstances see, e.g. *Yick Wo v. Hopkins*,[2] 118 U.S. 356 (1885) (a "selective prosecution" of a municipal ordinance); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) (infringement of free speech); *Wayte v. United States*, 470 U.S. 598 (1985) (infringement of free speech); *C.f. Strouder v. West Virginia,* 10 Otto 303, 100 U.S. 303 (1880). The question of unconstitutional applications of

child and both parents. It would be an obsurd argument under such circumstances to simply point out that a criminal trespass statute, in the abstract, is a valid statute on its face, and pretend that when the state removes the parent, which either purposely or, at least, foreseeably, results in the child's death, that the rights of the child and those of the parent to defend the child are "irrelevant." Thus the real question is whether the child and Mr. Loce possess the rights he claims, or whether the mother in this case had a constitutionally protected interest in terminating the child's life, an interest New Jersey sought to protect.

[2] *Yick Wo v. Hopkins*, perhaps the classical case finding unconstitutional the application of an otherwise constitutional statute, involved the enforcement of a municipal ordinance. Here, the state seems impressed with the fact that petitioners' convictions were originally in a municipal court with only a "trial de novo" in the Superior Court. The implication that an unconstitutional deprivation of an unalienable and fundamental right *must* be countenanced by this court if a state's strategy, in depriving its residences of such rights, includes "light sentences" in order to avoid review, is too plainly meritless to require extended comment. Regardless of the ultimate severity of the penalty imposed, the rights — ones government was created to protect — were totally lost as a result of the government's action. Once a child's life is taken, and all the rights in question completed denied, the unconstitutional character of the state's action in participating in the destruction of those rights does not depend upon the severity of the charge or scope of the punishment later imposed upon a father. Rather, it depends upon the direct and severe infringement of the rights themselves.

statutes often arise in "selective prosecution" cases, and although this case is not of that genre, the underlying principles applicable to those and other cases are even more applicable in this case. For instance, even if there is no infringement of a fundamental right a selective prosecution of an otherwise valid state statute is unconstitutional as applied if the prosecution is motivated by a discriminatory purpose. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Even a showing of discriminatory intent is not necessary if the application involves an overly discriminatory classification. See, *C.f. Strouder v. West Virginia*, 10 Otto 303, 100 U.S. 303 (1880).

However, where the State regulation of conduct limits a fundamental right, there need not be a showing of a discriminatory purpose, if the regulation is more than an "incidental" limit on the fundamental right, but is one which deprives the defendant of those rights. See, *U.S. v. O'Brien*, 391 U.S. 367, 367 (1968); *Wayte v. United States*, 470 U.S. 598, 611 (1985); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). In short, "acts generally lawful may become

unlawful when done to accomplish an unlawful end" or to "attain an unconstitutional result." *Gomillion v. Light Foot*, 364 U.S. 339, 347 (1960) (quoting *Western Union Telegraph v. Foster*, 247 U.S. 105, 114 (1917), and citing *United States v. Reading Co.*, 226 U.S. 324, 357 (1912)).

The underlying, and well established, principle is that "while an individual certainly may be penalized for violating the law, *he just as certainly may not be punished for exercising a protected...constitutional right." United States v. Goodwin* 457 U.S. 368, 372 (1982); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *C.f. Chaffin v. Stynchcomle*, 412 U.S. 17, 32-33, n. 20 (1973). In *Wayte v. United States*, supra, this Court expressed this point in broad terms:

> The decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification", *Bordenkircher v. Hayes*, supra, 434 U.S., at 364,...quoting *Oyler v. Boles*, 368 U.S. 448, 456...(1962), including the exercise of protected statutory and constitutional rights, see *United States v. Goodwin*, supra, 457 U.S., at 372..." *Wayte v. United States*, 470 U.S. at 609.

In the present case all of these policies and principles rendering applications prohibited are present. The lower courts, as well as the Appellate Division, found that the very purpose of the arrest,

removal and prosecution of the petitioners was to allow and achieve the termination of the child's life in order to protect the mother's "liberty interest" under the Fourteenth Amendment. If the "purpose" is impermissible the state action is unconstitutional. see *Shapiro v. Thompson*, 394 U.S. 618, 631. Thus, whether a mother possesses an interest to terminate her own child's life protected by the Fourteenth Amendment is critical. The exact nature of the interest the state seeks to protect by prosecuting the petitioner is pertinent to determine whether the petitioners' rights were merely "incidentally" affected by the state action or impermissibly infringed. One factor is whether the interest the state seeks to advance is an important one. *Wayte v. United States*, supra at 611. Whether the child is a human being whose life a mother has a protected interest in terminating is central to the question of whether the state is advancing a legitimate or "important" interest.

Most importantly is the fact that the child's natural and inalienable rights and those acquired under the due process and equal protection clause are directly involved. By the dismissal of Mr. Loce's civil suit and the arrest, removal and conviction of Mr. Loce and the other petitioners, the limitation of these rights was

not merely "incidental" but, those rights were by necessity, unavoidably, totally and irrevocably denied. Thus, the state's interest advanced by the removal, arrest, and prosecution of petitioners directly, not incidentally, impacted the fundamental rights of the child and petitioners. *Wayte v. United States*, supra at 611. The state interest advanced — the states perceived "duty" to protect a mother's right to kill her child — has as its purpose the destruction and total infringement of the rights advanced by petitioners.

The petitioners were prosecuted and convicted for exercising their constitutional and statutory rights and those of the child. Those rights included their rights to defend the child's life, to defend or assert the child's rights, and their right to assert all of the statutory defenses available to criminal defendants when they attempt to save and defend the lives of other human beings, which New Jersey recognizes in all other instances.

The State's action directly caused the loss of the child's life. Whether the child had rights, therefore, was essential to the determination of whether the prosecution is unconstitutional. Likewise, since the *purpose* of the State's action was to protect the mother's perceived "liberty interest" whether she had such an

interest protectible under the Fourteenth amendment is essential to the question of whether the State could deprive the petitioners of their statutory defenses of necessity. This was the "interest" the State sought to advance. The State refused Mr. Loce access to court and later physically intervened on behalf of the persons seeking to kill the child in order to accommodate the doctor and the child's mother to accomplish their aim. The father's conduct was necessary to save the child's life and his rights and those of the child. The simple fact is that once New Jersey dismissed his civil suit, no matter what form his necessary action took to save the child's life, he was subject to prosecution under some criminal statute as long as New Jersey believed it was obligated to protect the mother's right to terminate the life of the child. It is the statute chosen which is "incidental" to the State's decision to prosecute a father for saving his child's life. The sole reasons New Jersey refused to recognize the defenses raised was its belief that [1] it was not *required to acquit* because this court has never ruled that the child possessed any rights; and [2] the State was not *permitted to acquit* because *Roe* and *Casey* established a woman's "liberty interest" to terminate the child's life.

B. This Court Has Never Ruled That The Actual Humanity Of The Child Is Irrelevant, And Has Never Ruled That The Child Does Not Possess Rights Prior To Birth, Or Whether A Mother's Asserted "Interest" To Kill Her Own Child Constitutes A Liberty Interest Under The Due Process Clause In Light Of The Fact Of The Child's Actual Existence And Interest In Life. Determination Of The Relevance Of The Fact That The Child Is A Complete, Separate, Unique Human Being Is The Precise Issue That Requires This Court To Grant Certiorari In This Case.

The Appellate Division made it clear that the basis for the affirmance of the convictions of the petitioners rests entirely upon two conclusions: [1] New Jersey was precluded from acquitting the petitioners on the basis that the child possessed a right to live under the Fourteenth Amendment because the United States Supreme Court has never made such a ruling; and [2] New Jersey was required to convict petitioners because failure to do so would constitute an infringement of a mother's federally protected interest to terminate her child's life. Both conclusions directly implicate the relevancy of the fact that the child is a complete, separate, unique human being.

1. The Findings Of Fact.

The Appellate Division's opinion and the State Court's findings of fact, concerning the purpose of the petitioners' conduct and the purpose of the state's action renders irrelevant only the precise

statute selected by New Jersey to achieve its true purpose: the protection of what it believed was the constitutionally protected interest of a mother to terminate her child's life. The Courts found that the petitioners, the child's father and four women from whom he obtained help, sought to defend the child's life, and the child's constitutional rights. The Appellate Division unequivocally found that :

> The defendants bound themselves with handcuffs and bicycle locks *in order to block the entrance to the operating rooms.* Loce, who had *previously been denied a restraining order* and the other defendants *sought to prevent the scheduled abortion;* but were ultimately arrested. Subsequently the abortion was performed. [A-84-A-86; emphasis added].

The Law Division in its opinion expressed its findings in these terms:

> All 15 defendants handcuffed themselves together and physically blocked movement within the office with the intent to forcibly prevent the physician from performing the abortion. [A-90-A-91; emphasis added].

The New Jersey Courts also found that the purpose for the arrests was to protect the mother's right to an abortion. The trial judge held that the conviction of petitioner, was required because *Roe v. Wade "legalized the execution of a human being"* [A-200]. The trial court found that the petitioners' actions could not be justified

specifically because of the binding effect of *Roe* and perhaps more importantly, the "execution" of the child was "pursuant" to this courts decision:

> I find that the eight week old fetus in this case *was a living human being that was legally executed pursuant to the United States Supreme Court's decision in Roe v. Wade, and therefore, there was no justifiable excuse to trespass in this case and attempt to prevent a legal active abortion.* [A-200; emphasis added].

It is this conflict of interests --- those of the child in actual life asserted by the petitioners and the assertion by the State of the mother's interest to terminate even the actual life of an existing child --- which directly requires the determination of the relevancy of the fact that the child is a human being.

2. The Legal Conclusions.

The Appellate Division's opinion that the convictions must be affirmed rests upon two distinctly separate, but material legal conclusions. First, the court rejected petitioners' argument that New Jersey was *required to acquit* the petitioners based upon the Fourteenth Amendment because the United States Supreme Court has not yet expressly recognized that the child has constitutional rights [1-87-A-88].

Second, the court held that it was not free to acquit the petitioners on federal [or State] grounds because it *was required to convict* petitioners because the United States Supreme Court has previously held that a woman has a *"right to an abortion"*. The Appellate Division stated:

> The purported rights asserted by defendants, independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. *The simple and overriding fact is that each defendant committed [an]...offense in an attempt to prevent a legal and constitutionally protected abortion.* [A-87-A-88; emphasis added].

The Appellate Division found that the *overriding fact* was petitioners attempt to prevent what the court believed was a "constitutionally protected abortion." Whether the child had rights and whether the mother had a "protectible" interest in taking the life of her child are questions necessary to determine if the Court's "overriding" consideration was a valid exercise of New Jersey's police power.

Finally, the Appellate Division held that it need not state whether the fact that the child was a complete, separate and unique human being was relevant or "justiciable." [A-87].

The original conviction was based upon the trial court's

interpretation that this court's opinion in *Roe v. Wade* created the right of "a legal execution" [A-200]. That court indeed found that the execution of the child was "pursuant" to *Roe* [A-200].

There can be no doubt that New Jersey's original conviction of petitioners and their later affirmance directly implicate the constitutional question of the relevance of the fact of the child's actual existence and interest in actual life. That question has never been determined by this court and all of the states are in complete reliance upon this court reaching a determination on this question. Mr. Loce first sought such a determination in a civil suit in his effort to save the life of his child. The fact that it must be determined in a criminal action was not his choice on the one hand and the selection of the method by which the State sought to protect the perceived right of the mother is irrelevant on the other. The issues are directly drawn.

3. The Legal Authorities Cited By The State In Its Response Brief Are Irrelevant To This Case.

The State relies upon three cases to argue that the fact of the child's actual life is irrelevant: *Roe v. Wade, 410 U.S. 113 (1973)*; *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. ___, 112 S.Ct

2791 (1992) and *Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993). They are all irrelevant to the issues presented by this case. *Roe's* irrelevancy is discussed in both the Loce and Krail petitions. *Tilson* simply relies upon *Roe* and, like the New Jersey courts, the *Tilson* court felt required to follow *Roe*. In addition, the standing of the *Tilson* defendants to raise the child's rights was not the same as the father of the child, Mr. Loce or those who assisted him. Further, New Jersey, unlike Kansas, recognized the state statutory defenses of justification and necessity where defense of another human being is involved (see, Loce pet. p. 4). *Casey* simply reaffirmed the limited issues actually decided by *Roe* and did not address the facts or arguments raised in this case. It surely did not rule one way or the other on the legal question of whether the fact that the child is a complete, separate and unique human being is relevant to either (a) the question of the child's rights or (b) a mother's asserted "interest" in killing her own child as protected by the liberty clause of the Fourteenth Amendment.

Obviously, the State court's erroneous belief that the fact that the child in this case was a complete, separate, unique human being was irrelevant to the legal questions is not binding on this court even

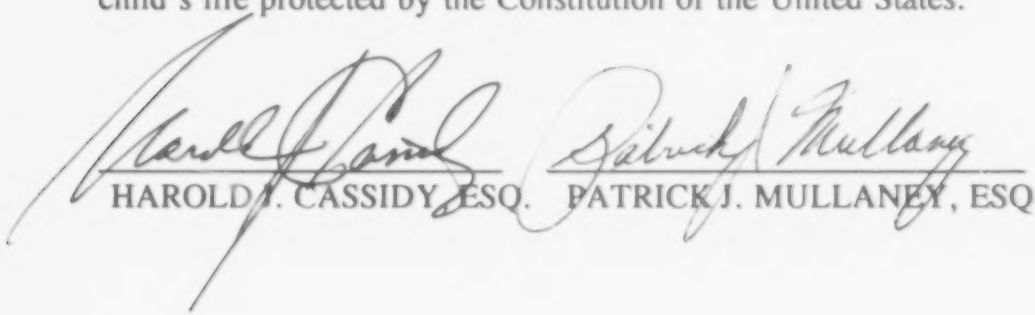
in the absence of findings of fact by the state court. Where a federal issue is involved, this court can make its own findings when the state courts think those facts are irrelevant or immaterial. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); see e.g., *Merchants National Bank v. Richmond*, 256 U.S. 635 (1920); *Carlson v. Washington*, 234 U.S. 103 (1914). In *Carlson* this court observed:

> "[s]o it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted federal right." see also *United Gas Public Service Co. v. Texas*, 303 U.S. 123 (1937); *Norton Co. v. Department of Revenue of the State of Illinois*, 340 U.S. 534 (1951).

CONCLUSION

The State's argument that the question of the child's actual human existence is irrelevant is contrary to the opinions of this court. This court, never having determined when life begins, has never stated that that question is irrelevant. The *Roe* court, by addressing the question at all, implied the relevance of the inquiry. That court simply held that it could not, at that time in 1973, determine the answer. This court must grant Certiorari to decide this issue and to determine the questions this case presents. This nation, its people, its future children and future generations, as well

as the peoples from the rest of the world who look to it as the guiding inspiration for all human rights everywhere, deserve and require a determination of these issues. This nation cannot endure in its leadership as a nation of laws and human justice under the cloud of the mistaken belief that its highest court has held that it is irrelevant to the administration of constitutional justice that a child is a human being; that this fact is irrelevant to whether the child enjoys the unalienable right to live; and that it is irrelevant in determining whether the child's mother has an interest in taking the child's life protected by the Constitution of the United States.



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